35
No. 229.

(Br. of Atty. Gen. Richards
for Pope) for U. S.

Office Supreme Court U.S.
FILED
MAR 22 1901
JAMES H. McKENNEY,
Clerk.

Filed Mar. 22, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

UNITED STATES, APPELLANT,
v.
JUAN PEDRO CAMOU. } No. 229.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

UNITED STATES, APPELLANT,
v.
JUAN PEDRO CAMOU. } No. 229.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR THE UNITED STATES.

On the 3d of December, 1891, JUAN PEDRO CAMOU, claiming to be the owner in fee of the private land claim situated in the county of Cochise and Territory of Arizona, commonly known as the SAN RAFAEL DEL VALLE GRANT, filed his petition for the confirmation of the same, alleging it to contain a little over twenty thousand acres. (R., 1–3.)

On the 21st day of February, 1893, plaintiff filed an amended petition, upon which the cause was tried. (R., 5–8.)

In the amended petition it is alleged that the petitioner is the owner in fee of the tract of land in the county of Cochise, in the Territory of Arizona, in the San Pedro Valley, on both sides of the river, between the range of mountains known as the Huachuca Mountains and the

range known as the Mule Mountains, the southern boundary line being about 6 miles north of the southern boundary of the Territory of Arizona, its northern boundary about 10 miles southwesterly from the city of Tombstone and about 3 miles southerly from the old town of Charleston.

Then follows the description of the grant as contained in the survey made by Mr. Roskruge.

Plaintiff claims the land by purchase under divers mesne conveyances from the original grantee, and alleges that at the date of the acquisition of said territory by the United States said title was complete and perfect.

That the grant was made and patent issued therefor to Rafael Elias under and by virtue of article 11 of the sovereign decree No. 70 of the general congress of the Republic of Mexico of the 4th of August, 1824, and said patent was issued to said Rafael Elias on the 25th of December, 1832, by José Maria Mendoza, treasurer-general of the State of Sonora, in accordance with the above decree and law No. 30 of the 20th of May, 1825, of the State of Sonora and Sinaloa, regulating the system of selling the public lands.

That the condition imposed upon the grantee and his successors was that they should keep, settle, and protect said lands, without their being deserted or abandoned for any time, and in case total abandonment took place for three consecutive years, and anyone petitioned for them, upon the fact being proven, they would be declared public lands and regranted in favor of the highest bidder,

except when the abandonment be occasioned by the notorious invasion of the public enemies.

It is alleged that the grantors and predecessors in interest of the petitioner, upon issuance of the patent, duly entered into the possession of said granted premises, settled and occupied the same according to said conditions.

That no breach of the conditions of said grant was ever claimed by the Republic of Mexico; that said grant has been duly located and recorded in the archives of Mexico prior to the 25th day of September, referred to in Article VI of the Gadsden treaty; that the grantors and predecessors in interest of the petitioner were the owners of said grant at the time of the adoption of the treaty of Guadalupe Hidalgo and were citizens of the Mexican Republic. That the grant in question, according to the survey and map made by George D. Roskruge on June 21, 1891, contains 20,034.62 acres, which map is filed as an exhibit in the case.

Several persons are named in the petition as being in possession of portions of said grant otherwise than by lease or permission of the petitioner.

It is further alleged that the claim had been presented to the surveyor-general of the Territory of Arizona, pursuant to an act of Congress approved July 15, 1870, and departmental instructions of January 5, 1877; that under said authority the surveyor-general examined into the validity of said grant, authorized a survey thereof, reported thereon favorably, and recommended the confirmation of said grant

by Congress. The petitioner prays that the validity of the grant may be inquired into by the court. (R., 5–8.)

This claim is based upon a certified copy of a *testimonio* (Spanish, see R., 87—translation, see R., 95) offered in evidence by the plaintiff, from which it appears that Joaquin Elias, on behalf of Don Rafael Elias, presented his petition to the treasurer-general of the State of Sonora, stating that, needing land for stock purposes, he asked for the public lands adjacent to the ranch of San Pedro, within the jurisdiction of Santa Cruz, as far as the place called Tres Alamos, binding himself to make good to the nation the duties which belong to it and whatever else might be just to acquire the title deeds and a confirmation thereof. This petition is dated at Arizpe, March 12, 1827. (R., 96.)

On July 1, 1827, the treasurer-general, Nicolas Maria Gaxiola, issued an order directed to the *alcalde* of the police of Santa Cruz, empowering him, without prejudice to any third party who might have a better right, and previously summoning the adjacent owners, to proceed to survey, appraise, and offer at public sale for thirty consecutive days the lands indicated in the foregoing petition, acting strictly in all things in accordance with the sovereign decree of the constituent congress of the State, No. 30, of May 20, 1825, and the regulations attached to it, and upon completing the proceedings he should transmit the same to the treasury, giving notice to the bidders that they may present themselves, either in person or by attorney, at

the auction that would take place after the three public auctions provided by law. (R., 96.)

In obedience to said order, at the *presidio* of Santa Cruz, on August 20, 1827, Pablo Fraijo, constitutional *alcalde* of the police of the *presidio* of Santa Cruz, executed the act of obedience, wherein he states that he would go to the ranch of San Pedro in order to proceed with the survey of the lands petitioned for—that is, those that are petitioned for by the said Rafael Elias, whose survey must be made separately from those that have to be made for the other petitioners, whose entries are made jointly and appear in the copy of the writing with which these proceedings begin. (R., 96.)

The *alcalde* proceeded to appoint counters, tallymen, and chainmen, and they were citizens Maurico Niera, José Sainaniego, Manuel Soto, and Camilo Arvisu, who were duly qualified, and after examining the interested party and the adjacent owners the survey proceeded. (R., 97.)

The proceedings of survey state that at the place called San Rafael del Valle, on the 21st day of August, 1827, in order to begin the survey of the lands to be taken up by the citizen Rafael Elias, a cord of 50 *varas* was prepared and poles tied at either end. The center point taken was at a place where "there are some small hills," and, taking the direction of the south, there were measured and counted 200 cords, which ended at the limits of the San Pedro ranch, and the superintendent of said ranch, being present, exhibited documents which showed that his survey extended up

to that point, a monument of which standing there was taken as the boundary of one and the other of the interested parties.

After returning to the center monument, a northerly direction was taken, "measuring and counting 200 cords, which ended upon a valley where there is a small calcareous knoll, where I ordered to be placed a heap of stones as a monument." (R., 97.)

Having again returned to the center, there were measured and counted toward the east 50 cords, "which ended upon a valley and fronting the Mule Mountains, and where I put a heap of stones as a sign of a monument."

Having again returned to the center, there was measured toward the west 50 cords, which ended upon the same valley, fronting toward the Huachuca Mountains, where there was put a heap of stones as a sign of a monument.

Having squared the measurements, there resulted 4 *sitios* for the raising of cattle and horses in favor of the aforesaid citizen, Rafael Elias, with which he was satisfied, and he took possession of the land so segregated, and was informed that at the proper time he was to mark his limits by monuments of stone and mortar, as provided by law. (R., 97–98.)

At the conclusion of the survey, the *testimonio* states that immediately thereafter the *alcalde* proceeded to the appraisement of the land through experts, who were Manuel Soto and Camilo Arvisu, who, having taken the oath in conformity with the superior regulations in the

premises, adjudged the value of the four *sitios* to be $240, at the rate of $60 each, because they had running water, and with this appraisement the *alcalde* put them up at auction, asking for bidders, for thirty consecutive days, from August 30 to September 28, 1827, and there being no bidders, the proceedings were closed. By order of the 30th of the same month, after summoning the interested party, the *alcalde* remitted the proceedings to the treasury-general, to be put up at auction, which, by the decree of February 7, 1828, were placed before the fiscal attorney, whose opinion follows. (R., 98.)

The report of Attorney-General Brena, dated February 7, 1828, states that there are extensive defects in the proceedings; but as they do not present any great obstacle he omits comment upon them, and says he "only finds it strange that no use was made of the compass in making the survey, as this instrument is indispensable to follow a route. So that to survey the land over again for want of this requisite is to enter into difficulties and greatly to injure the claimant, for which reason the fiscal attorney, there being no contestants that show any damage to third parties, is of the opinion that this fault be overlooked, and that the proceedings be continued to adjudication, according to the forms and requisites in use." (R., 98.)

The *testimonio* then states that the treasurer-general was satisfied with the foregoing report of the fiscal attorney, and by order of April 16 proceeded with the three public *almonedas* on the 16th, 17th, and 18th,

asking for bidders, and there appearing none, the 4 *sitios* for raising cattle and horses at the place San Rafael del Valle were auctioned off in favor of Rafael Elias, as appears by the last *almoneda* which follows. (R., 99.)

The third *almoneda* recites that the board having convened, they proceeded to the last auction for the 4 *sitios* of land to which the prior proceedings referred, and there being no other bidder the same was sold to Elias; further reciting, "in these terms these proceedings concluded, the 4 *sitios* of land for raising cattle and horses being publicly and solemnly auctioned off in favor of the interested party in the sum of $240, for which they were appraised," and the same is signed by the members of the board. (R., 99.)

A further recital is made that the attorney for Elias, Tiburcio Gomez, proceeded to pay into the treasury $240, in which the 4 *sitios* at the place of San Rafael del Valle had been auctioned off, as appears by the certificate which follows. (R., 99.)

The certificate of the treasurer-general states that he has entered in the book of the treasury for the current year, on folio 14, the charge for grant of lands, $240, paid by Don Tiburcio Gomez in the name of Don Rafael Elias, for the grant of 4 *sitios* of land for the raising of cattle and horses in the place named San Rafael del Valle, in the jurisdiction of the *presidio* of Santa Cruz, each *sitio* having been appraised at the rate of $60 on account of having running water; and the same is signed by Gaxiola and Tiburcio Gomez. (R., 99.)

Then follows the certificate of the treasurer-general, Gaxiola, dated April 21, 1828, concluding the proceedings.

This concluded the proceedings for 1828, and, so far as the *testimonio* is concerned, there is nothing appearing to show why title was not issued at that time.

Immediately following is the grant or patent by which the treasurer-general of the State of Sonora, on December 25, 1832, seeks to extend the title, stating that the proceedings were concluded with all the requisites and formalities provided by law, and remained in the custody of the treasurer-general as a perpetual monument of title. Wherefore, in the exercise of the faculties conferred upon him by law, and in the name of the sovereign State of Sonora, he granted in due form of law the 4 *sitios* of land for the raising of cattle and horses comprised in the locality of San Rafael del Valle, situated in the jurisdiction of the *presidio* of Santa Cruz, in favor of the citizen Rafael Elias, to whom he conceded, gave, and adjudged the said land by way of sale, with the condition and permanency established by the law, for himself and his successors, with the injunction and condition that he must keep said *sitios* occupied and settled, without letting them be abandoned or deserted for any time, with the understanding that if they be abandoned for the period of three consecutive years, and there should be any person to petition for them, in such event, with previous proof made of the fact, they would be declared public lands and granted anew to the highest bidder, excepting in such cases where the abandonment is caused by

the notorious invasion of the public enemies, admonishing said Elias and his successors that they must keep and confine themselves to the lands and limits as marked precisely in the foregoing proceedings of survey, and comply exactly with article 30 of law No. 30 of May 20, 1825, which imposes obligations to mark the metes and boundaries with monuments of stone and mortar. (R., 100–101.)

Indorsed thereon is the following memorandum: "A memorandum of this present title is entered in the proper book kept in the archives of the treasury-general."

This title was evidently issued under and in pursuance of the order of Governor Bustamante, dated Arizpe, April 29, 1833, which is numbered 762 (R., 101), wherein he states that there was auctioned off on April 18 and December 24, 1828, the properties of San Rafael del Valle, San Juan de las Boquillas y Nogales, and San Ygnacio del Bavocómari, situated in the jurisdiction of Santa Cruz, to the citizen Rafael Elias, owner of the first of said properties; Captain Ygnacio Elias Gonzales and Nepomuceno Felix, of the second; and Ygnacio and Eulalia Elias, of the third. Having shown that it was no fault of theirs that the treasurer-general of the State that was once united had not issued them their respective titles, and from which office they demanded them anterior to July 10, 1830, he would proceed to issue said titles in accordance to what is provided in decree No. 27, of August 11, 1827.

It is admitted on behalf of the Government that the

expediente of this grant is on file in the archives at Hermosillo and is in the usual form; that although the grant was dated December 25, 1832, the *toma de razon* was not made nor the title delivered until May 8, 1833. (See certificate of *toma de razon*, R., 102.)

It will be noticed from the petition for the grant and the survey that the location of the San Pedro ranch is important and necessary. It has been contended by the Government that the location of the San Pedro grant is entirely within the Republic of Mexico, and that there is an excess (*demasias*) over the *cabida legal*, between the north line of said grant and the international boundary line. It is also contended by the Government that the center monument, called for in the survey of the San Rafael del Valle grant, can not be found.

R. C. Hopkins testified on behalf of the plaintiffs, and his testimony may be included in an admission by the Government that the *expediente* on file is in the usual form; that the signatures, so far as the Government is able to determine, are genuine; that the *toma de razon* of the same exists in the proper book in the proper archives. (R., 27–32.)

The plaintiffs introduced in evidence a large number of documents showing the deraignment of title from the original grantee to Camou. (R., 32–33.)

George G. Roskruge testified on behalf of the plaintiffs that he has resided in Arizona for twenty-two years and has been a surveyor by occupation for twenty years. Made a survey of the tract of land known as

the San Rafael del Valle grant in May or June, 1891, at the request of Mr. Camou. There were with him John W. Taylor, Ed. Wood, Douglas Snyder, and a portion of the time Max Marx; also the son of counsel, Mr. Herring, and Mr. Camou part of the time. He had a translation of a certified copy of the *expediente* with him; went down the valley of the San Pedro River, covering a point from Charleston running south to San Pedro, in Mexico; went all over the valley and looked for what was described in the *expediente* as a hill or mountain in the center of the valley as a central point, which he failed to find; then went to the limy hill, where he finally found a monument on top and a post in it that had been set there and marked by Mr. Charles M. Allis, deputy United States surveyor, who made a survey of the grant for the United States Government. This post which he found in the monument on the summit of the limy hill was the north center of the grant as called for in the *expediente*, and there was no other limy hill in the whole neighborhood. Witness states that he never saw anything located "differently" in his life. It looked like a lot of burnt lime, calcareous, or whatever it might be called. The whole top was covered with a limy formation, like cinders, and there were stones broken and fractured all around.

He ran from there north 85 degrees east 6,204 feet to the summit of a hill, where he found a monument. It was an old monument, which he took to be the monument of the grant, it being very near to what he would call at right angles to the center line of the grant coming up the valley.

He then came back to the limy hill and ran north 81 degrees west 6,200 feet, where he found another monument of stone. It looked like an old monument, but it was not as high or as big as the one at the east.

Having found these two monuments, he next ran down the valley to find, if he could from the papers he had, the north boundary of the ranch of San Pedro, which was called for in the *expediente* as being the southern boundary of the grant: chained down through the center of the valley; had a translation of the San Pedro grant, and went to a monument that he supposed to be the center of the grant. That monument was a square-built monument, the best monument the witness had ever seen in Arizona, except the boundary monuments. It was built of stones and had the appearance of being built by a mechanic and not thrown loosely together, but it was a regularly square-built monument. It was within the boundary of the United States. Witness then went to Ochoaville, where there were old ruins which he says answered the description called for in the *expediente* as going to the northeast; witness refers to the call in the San Pedro *expediente*. He found a lot of ruins on the bank of the San Pedro River and found an old monument of stones. Then he ran farther on toward the northeast and found two little hills. This old monument which he found at the San Pedro River he believes to be one of the monuments of the San Pedro grant as called for.

He then continued his line until he came to a place out from the valley which answered the description of

the little hills, and they were the only little hills that he found in the whole valley that would answer the description. He then ran over and found a stone monument which is called for in the San Pedro *expediente*. Witness gives the caution here (R., 39): "I am running out the San Pedro *expediente* now from the center northeast." He then went to the Bachata *cañon*, a point in the San Pedro, and had no difficulty in finding this *cañon*, which is large and well defined. There he found a monument, but not having a certified copy of the *expediente* with him at that time, and having no one with him who could tell him that it was the Bachata *cañon*, he left and came back to Tucson, and notified counsel that he wanted a certified copy of the *expediente*, and would return with witnesses who could tell him whether that was the Bachata *cañon* and whether those were the points called for in the *expediente*. Witness subsequently returned to the valley to continue his survey, and there appeared before him as witnesses to the name Bachata applied to the *cañon* an old Mexican by the name of Gonzales and another by the name of Concepcion Elias.

Mr. Douglass accompanied him on the second trip. He stated he went to the monument so well built, the center of the San Pedro, and asked the Mexicans what monument it was, to which they replied that they did not know, but it had been there a long time, ever since they could remember. Witness pointed to the line monument and asked them what it was, and they said it was a line monument; that one of the Mexican wit-

nesses was a soldier when that monument was built; the square monument was there several years before the line monument was built. Witness asked them to take him to the ruins, and at the ford—crossing below the ruins—Mr. Snyder and himself chained the distance up to the old ruins. Saw no other old ruins in the valley except these. He asked if there were any other old ruins in the valley, and the Mexicans replied that there were none, only away down below Fairbanks. At the request of the witness the Mexicans took him to the ford and said that it was the old crossing; they could trace the old ruins all over the ground. There was a Texan living on the bank of the river, having been there a long time, but he does not remember his name. From there they went over to the little hills which could be seen from there—they were stony hills. Witness then requested the Mexicans to take him to the brushy place mentioned in the *expediente*, and as it was all brush they could not find anything, but they were sure *they were on the right track*. Witness asked them to take him to the Bachata Cañon, and they took him to the place where he had been before and said that it was the Bachata *Cañon*. That gave him good reason to believe that he had found the northeast corner of the San Pedro grant. In the *cañon* they found an old big monument of stones, and in looking near it they could trace out that it had originally been a monument, built up square; but the foundation was coming out, similar to the other one, but that it had fallen down.

Witness produced a photograph of what he calls the initial monument of the San Pedro. The witness also presented a photograph of the little limy or calcareous hill. (Exhibits 9 and 10.)

Witness presented and identified photograph of the monument found in the Bachata *Cañon*, being the northeast monument of the San Pedro grant, which was marked Exhibit 11.

Exhibit 12 was a view looking down the Bachata Cañon from the northeast corner of the San Pedro grant.

Exhibit 13 was a second view of the initial monument of the San Pedro grant.

Exhibit 14 was a photograph of the monument at the northeast corner of the San Rafael del Valle grant.

Exhibit 15 was a photograph of the northwest corner monument of the San Rafael del Valle grant.

Having found the Bachata monument and *cañon*, he then ran due west to the center of the valley, right to the San Pedro River, and finding nothing, projected the line farther west and searched on the plain, but could not find a single thing. Witness put a post on the north line of the San Pedro grant, which was used as a base line, which was 13,100 feet from the monument in the Bachata *Cañon* down to the San Pedro River. He then ran from the north center down to this point, which he marked as the south center. Witness ran other lines between these all around the fences in the grant.

Witness produced and identified a photograph of the

San Pedro grant monument on the rocky hill in front of the Sierra de Huachuca, marked "Exhibit 16."

Exhibit 17 was a photograph produced by him "of hills on the east side of the San Pedro River, Pyatt's house at the foot of the hill, "the line terminating in the valley at the skirt of a hill (quoting from the *expediente*), at the distance therefrom of 3 cords, where I caused a corner monument to be placed;" it is looking southwest.

Exhibit 18 was a photograph, produced and identified by the witness as of the "Sierra de Huachuca," from the monument on the rocky hill in front of the Huachuca Mountains.

Exhibit 19 was a photograph "showing the Huachuca Mountains in the rear."

Exhibit 20 was a photograph produced and identified by the witness as "View looking from the post S. R. G. No. 8 to old N. E. corner monument of San Rafael del Valle P. L. C. monument on hill in center."

Statements were taken from the Mexican witnesses who were there by one of the counsel. There were also present Douglass Snyder and Mr. Marks, but he does not remember the others. (These statements were offered in evidence, but as the Government had the witnesses present they were excluded.)

Witness made a calculation of the area within the lines which he surveyed and described, and it amounted to 20,034.62 acres; also made a map from the data which he obtained by this survey. Witness identifies the map and says it is a correct delineation of what he

saw and found upon the various points described by him. (Exhibit 21, R., 180.)

This is the testimony in chief of Mr. Roskruge, who is the same gentleman who testified in the Sonoita case and made the survey, and in making it paid no attention to distances and quantity called for, and but little attention to the directions, and he evidently made this survey in the same manner.

On cross-examination he states that he had the *expediente;* he undertook to retrace the steps of the prior survey, but he did not undertake to make the measurement, because, as he says, he could not find the center monument; he hunted all over the country for it without finding it, and is unable to explain why he did not go to the north line of the San Pedro grant to start with, in order to measure back and find the center monument. Witness states that in hunting the north line of the San Pedro grant to find the south boundary of the San Rafael del Valle he located the line in the United States, and is satisfied that it is inside; thinks that the center monument of the San Pedro grant is half a mile inside of the United States line—that is, what he believes to be the center monument. He went to what he supposed to be the initial monument of the San Pedro grant, and his survey of the San Rafael del Valle is based upon the fact that he located this initial monument of the San Pedro grant in the United States. Witness is unwilling to admit that his survey is wrong provided the initial monument of the San Pedro grant should turn out to be 10 miles south of the international boundary line.

Witness did not find any limestone hills located along the San Pedro, and did not see anything which looked like them. He went all over the country down to where the custom-house is; went clear down to Mexico on the San Pedro ranch, but did not find any limestone hills there.

On further cross-examination, going over the *expediente* with the witness, he states (R., 41–42):

> Q. Now let us go over the *expediente*. It says in the presence of the interested party the measurement was begun at a place where there were several small hills.
>
> A. Yes, sir.
>
> Q. Did you find that point?
>
> A. That is the point I told you I did not find.
>
> Q. You did not?
>
> A. No, sir.
>
> Q. Then, "continuing a south course, there were measured and counted 200 cords, the line terminating at the line of the *rancho* of San Pedro." Did you find the *rancho* of San Pedro near that line?
>
> A. I found the *rancho* of San Pedro away down in Mexico.
>
> Q. Did you undertake to find whether there were some small hills north of that? You say you found the *rancho* San Pedro south of the line.
>
> A. I found a ranch called San Pedro; yes, sir.
>
> Q. And did you find any small hills north of that ranch?
>
> A. I don't recollect of any small hills north of that ranch until I come up this side of the

line, probably about a mile, and then there were some small hills.

Q. Would they have answered this call?

A. Well, it would have been a terrible stretch if they did.

Q. Wouldn't they come as near answering this call as a pile of stones answers your monuments out there?

A. No, sir.

Q. How far did you continue north before you located these hills?

A. Which do you refer to?

Q. I am speaking of the small hills at which the survey is located.

A. I never found any.

Q. There were some small hills north of the San Pedro ranch—as you found the ranch in Mexico—at the time.

A. Yes, sir.

Q. (Reading:) "And in his name was present the administrator of said *rancho*, with documents showing that his measurement extended to that point, etc. Returning to the center, the course was run to the north two hundred cords, which terminated in the same valley at a point where there is a small limy hill." Now, how far north from the San Pedro ranch do you locate this limestone hill?

A. As near as I can tell, probably a good 25 miles from the San Pedro ranch.

Q. And that you take as the north center monument?

A. Yes, sir; that is what I take it for and believe it to be.

Q. Twenty-five miles north of the San Pedro ranch you found a little limestone hill (interrupted)——

By Mr. HERRING:

Q. Are you speaking of the ranch or the ranch house now?

A. I am talking about the San Pedro custom-house. That is the only San Pedro I know. That is 8 or 10 miles below the line, where Mr. Elias lives.

Witness states the little limestone hill is 15 or 20 miles north of the international boundary line. He found a monument there, and at that point was 25 miles north from the ranch house of the San Pedro ranch. States that he hunted for the monument which the *expediente* says was 50 cords east from the center and terminating in the valley in front of the Mule Mountains, but did not find it. He believes that he ran a line and it brought him somewhere on the *mesa*. The Mule Mountains were 8 or 10 miles away and he did not find any pile of stones there. The west center monument which the *expediente* locates as 50 cords west of the center terminating in the same valley, in front of the *cordillera* of the Sierra de Huachuca, at which place a pile of stones was placed for a monument, he did not find, although they all hunted for it. He ran a line from the north center monument 50 cords west, but he did not find the monument.

As to the manner in which he made his survey, he says he came down the river and ran a line from the limy hill south on his plat, and taking the distance

called for in the *expediente*, 50 cords, measuring them out, he drew his lines from the northeast and southeast down, showing what he believed to be the land covered by that *expediente* between the San Pedro and the limy hill, and that he paid no attention to the area designated in the *expediente*. Says he designated the first course that he laid off from the north center monument by platting, and had no instrument. He ran down on Allis's course 10½ miles and found the place for the monument and checked back on it, and from there he ran farther south, connecting with a flag that he left on the bank of the river, which he put there after running east from the Bachata *Cañon*. He took as a basis for his survey the monument established by Mr. Allis with a pole in it, on the top of a hill.

Witness states that he established the subordinate points, but was unable to establish the initial point; he did not try to establish it, however, but looked all over the country for it and did not find it as described in the *expediente*. As a matter of fact, he states that he could not find any such initial monument as called for in the *expediente* in the valley of San Pedro and included within his survey; says the *expediente* is without any initial point so far as he is able to determine; at least he could not find it. Witness attempted to find the little hills called for as the center monument, going up the San Pedro Valley toward the ranch, and the only ones he could find were those called for in the San Pedro grant, the second course from the ford, and he supposed they were one of the monuments of the San Pedro ranch;

says he could not tell anything along the whole valley that would answer the calls for the initial point; that he did not determine the north center monument by any measure, but just took it arbitrarily and went right to it, as he could not get a measurement from anywhere. He did not run the outside lines of the grant; he simply ran the end lines and then squared it. Says he believes the San Pedro grant is in Arizona; he knows where it is down below. Elias had leased a lot of land on this side of the line, and Mrs. Elias told him the north line of the San Pedro grant was above Hereford. Taking the *expediente*, witness says if it were necessary for him to establish the initial point, he could not make the survey. (R., 33–50.)

IGNACIO BONILLAS testified on behalf of the petitioners that he was a mining engineer and surveyor and had been for eleven years in the State of Sonora and in the Territory of Arizona. Knows the international boundary line as it runs between the Huachuca Mountains on the west and the Mule Mountains on the east, and he finds that the line runs through the southern extremity of the Huachuca Mountains and does not touch the Mule Mountains at all, leaving them to the north.

Being made the witness of the United States, he testified that he had made a survey of the San Pedro Palominas ranch, lying south of the line; that his survey was simply a resurvey of the survey made by Pedro Bamolera and he used his map and field notes, AND LOCATED THE RANCH SOUTH OF THE INTERNATIONAL BOUNDARY LINE. There was a surplus or *demasias*

south of this line. Witness identifies a map made by himself and states that it is correct, showing the location of the San Pedro ranch as Mr. Bamolera gave it and according to the resurvey which he made of it.

Going down the San Pedro River, he states, there is a row of hills, which he would call *lomas*, along the river, but not all the way; they are located in different places, but not continuously; they come up to the international boundary line and they are along the San Pedro River, which runs up into Arizona. Witness's map (above referred to) is a correct location of his resurvey, and the lines were verified by himself. He states that he found some mistakes in the original survey and that was the reason he was appointed to make the resurvey; that THE SAN PEDRO GRANT AS LOCATED BY BAMOLERA, AND RELOCATED BY HIM, IS ENTIRELY WITHIN OLD MEXICO, AND THE MAP IS CORRECT. This map was offered in evidence by the Government and will be found in the record. (R., 246.)

On cross-examination he states that he did not have the *expediente* of the San Pedro grant with him, and did not pretend to locate the calls of that grant, and does not know whether the map locates them as described in the *expediente;* he was appointed simply to run certain lines of and correct the survey previously made, and does not know whether the map in any respect locates the calls of the grant as expressed in the *expediente*, but says it is correct as to the distances and courses marked on it; has no recollection where and what the natural monument called for in the San Pe-

dro grant is. Does not know of any other San Pedro grant in that vicinity on the San Pedro River. The original grant, or *cabida legal*, is supposed to be 4 leagues. Witness translates the term "*cabida legal*" to mean the area called for in the title papers of the grant. (R., 50–54.)

DOUGLASS SNYDER testified on behalf of the plaintiffs that he resided in Tucson, and in 1891 went with Roskruge to assist in the survey of the San Rafael del Valle grant. There were also there the parties known as Concepción Elias and Antonio Gonzales. They were attempting to locate either the south end of the San Rafael del Valle or the north end of the San Pedro grant. When the two Mexicans came they took them over to an old monument, partly fallen down, close to the boundary line, whereupon Roskruge asked them what that monument was, and they replied they did not know. He asked when it was put there, and he thinks Gonzales replied that he was a soldier at the time the boundary was established, and that monument was there long before that. Roskruge asked them to take them to the old ford, and they went a little beyond Ochoaville to the old ford, where they crossed the river and skirted along the small hills that lie to the east from the river, and finally arrived at what they called the Bachata *Cañon*, and on the bank of it found quite a large monument, built of rock, which had the appearance of being built there a very long time, judging from the drift and vegetation banked around it. Witness says he has been out frequently before with surveying parties.

On cross-examination the witness states that he does not know how far this *cañon* is from the international boundary monument. After they crossed the river, they rode along on horseback in the brush for an hour and a half or two hours; that is as near as he could come to the distance. The old monument, which was partially fallen down, is probably a quarter of a mile from the international boundary line, which is in plain sight looking diagonally across the valley. The monument found in the Bachata *Cañon* was a pile of stones. He has seen similar piles scattered over the country, but not many. Witness describes this monument as a large monument and he could not conceive why it was there. It was a good-sized monument and quite large. The stones were large at the bottom and smaller as you got to the top. At the bottom were big bowlders, probably 18 inches in size. (R., 54–56.)

Max Marks testified on behalf of the plaintiffs that he lives in Sonora, but formerly lived in Tucson, in Arizona, and knows Roskruge and Douglass Snyder; was with Roskruge in 1892 on the survey and knows the country pretty well; lived for five years at the San Pedro custom-house; remembers the two Mexicans, Concepción Elias and Antonio Gonzales, being present. When they came, the party went to what they believed to be the center initial monument of the San Pedro grant. From there they went down toward what was pointed out as the old ford, on the west bank of which, before they crossed, they found an old monument which the *expediente* of the San Pedro grant

calls for. They crossed the river, and there were some small hills on the east side of it, and from there they went to a rocky hill where they found a monument of stones; and from there the Mexicans took them up to what was called the Bachata *Cañon*, to which they had requested them to take them. Roskruge and the witness rode ahead and were down in the *cañon*, and riding up the south bank a little ways they found the monument. This was after the *cañon* had been pointed out to them by the Mexicans. The Bachata monument the witness describes as very large; it was not as high then as when new, having toppled over, but the base looked as well put up as when it was first placed there.

On cross-examination witness stated he went after these two Mexicans down in Sonora and found them at Santa Cruz, 30 miles away, and accounts for his securing them because he was around the Bachata *Cañon* and a Mr. Green told him that he thought it was the Bachata *Cañon*, but would not be sure of it; so he tried to find men who knew it was the Bachata *Cañon*, and at San Pedro he was informed that he might find them at Santa Cruz, as there were old men there that used to live on the ranch; so he went after them and found these two men who could show him the Bachata *Cañon*. They told him they knew exactly where it was, so he brought them up. They went to find the Bachata *Cañon* because they were trying to establish the San Pedro grant, and it was one of the main points, because it was a natural object. Witness was shown photographic Exhibit 13, and says he thinks

it is the center monument of the San Pedro grant, but it is possible it may be the Bachata *Cañon*, having only seen the picture but once before. That monument is in the United States; he could not tell the exact distance inside of the line, but from half a mile to a mile perhaps. (R., 56–58.)

CHRISTOPHER LAYTON testified on behalf of the defendants that he first came into the valley of the San Pedro in 1846, when a member of an expedition of 500 men, independent of the officers. They came in through San Bernardino Pass, quite a distance above Contention, and went down the valley, leaving it about 2 miles below where the Babocómari stream comes in. Their expedition sometimes would cover a considerable stretch of territory, and there was no one living in the San Pedro Valley at the time, and he never saw any signs of anyone. (R.)

P. C. MERRILL testified on behalf of the defendants that he first came into the San Pedro Valley in 1846, and since that time had been familiar with the valley from Benson to the international boundary line. Found no one living in the valley at the time he first came there. He came back to the valley again in 1877, and they made a halt at the Huachuca Mountains, Gardiner's ranch, and found a company of United States soldiers and officers at what is now called Huachuca fort; from there they kept on south near the end of the Huachuca Mountains, and he learned the names then. He came to a monument between the two republics which was very prominent and easily discovered. From

information he had received from General Wasson he was very pointed in those matters. After coming to the monument he turned around and went down the valley as far as Tres Alamos, which is about 4 miles from the international boundary line. There was nobody living there at the time.

On cross-examination he states that the only person whom he met in going through the valley was a man by the name of Landers, who was not an actual settler any more than he was. This was in 1877. Knew a man by the name of J. H. Slaughter, who was sheriff of Cochise County, but he did not see his house or any other house in the valley in 1877, and to the best of his recollection there was no house in the San Pedro Valley then. (R., 60–63.)

HENRY O. FLIPPER testified on behalf of the defendant that he was a civil engineer and employed at the time as special agent of the Department of Justice; that he was familiar with the Spanish language and had had eleven years' experience in surveying Spanish and Mexican grants in Mexico and in examining the archives and records of those grants; that he had examined the documents in the archives at Hermosillo, State of Sonora, Mexico, in relation to this grant; that the matrix or *expediente* is in the archives; that the *expediente* begins with a petition by Ygnacio Elias and Eulalia Elias, in company with Rafael Elias, Capt. Don Ygnacio Elias, and Nepomuceno Felix, signed by Joaquin Elias, Rafael Elias, and Eulalia Elias; that the word "Ygnacio" is erased and "Rafael" written

over it; that the Spanish words for "Dona Eulalia Elias" and for "in company with D. Rafael Elias, Capt. Don Ygnacio Elias, and D. Nepomuceno Felix" have been crossed out; that in the signatures "Rafael" has been written on top of "Ygnacio" and "Eulalia Elias" crossed out; that this petition is a copy and not original; that the usual statement that the petition is admitted is omitted; that the order of Gaxiola appointing the surveyor is a copy, including the signature of Gaxiola; that the application, act of obedience, appointment of assistants, and the examination of the ground, survey, and appraisement, the *pregones* (publications), order to approve ability to stock, etc., the declaration of witnesses, act of conclusion, and notification of Elias, are all in the same handwriting; that the signatures to the petition are all in the same handwriting, and that handwriting is the same as in the body of those writings; that the three *almonedas* (public offers of sale) are signed by Treasurer-General Gaxiola, but not by the Attorney-General, Manuel Brena; that there is a certificate of payment for $240, but nothing about the usual fees for title; that there is attached to the *expediente* a copy of the certificate read in the Babocómari case to the effect that the State Government had consulted the Supreme Government and reply was awaited before the title would be issued; that an indorsement on the *expediente* stated that title was issued December 25, 1832, and that there was a *toma de razon* in the proper book, stating that title was issued to Rafael Elias Gonzales.

Mr. Flipper also testified that he had examined the

large monument described by Mr. Roskruge; that it was a monument on the international boundary line, built in 1853 or 1854 by the American Boundary Commission; that he knows it was such because it was so marked when he was there in 1885; that the history of this monument is given in the report of Major Emory, and is that the American commission built it as on the line, and that when the Mexican commission arrived later it was unable to find this monument and built another about a quarter of a mile farther west; that he had retraced the line and knows where both of them are.

Witness further testified that he had investigated this grant on the ground, having a copy of the *titulo* and claimants' map; that he went to the north center monument, which is a post set in a pile of limestone on top of a small hill; that he went thence south down the valley hunting for the center or initial monument, but was unable to find it, as there was no place he could identify as being the place described in the *expendiente;* that he went to the place marked on claimants' map as the south center monument, but could not find it; that he went all over the ground laid down on that map, but could find no monument or anything resembling one; that he took a man from Mr. Green's ranch there and went to the southwest corner, where there is a fence but no monument, the man saying the corner is supposed to be where the fence is, but there is none there nor anywhere in the vicinity; that he went to the southeast corner, but was unable to find anything marking that corner, although he

ran out the full length of the south line from the corner of that fence; that the line he ran out was the south line as laid down on the Roskruge map; that he then returned to the north center monument on the small limy hill and went west to the northwest corner, where he found a stake which he knew to be a corner of the Wasson survey, *unlike the one described on the Roskruge* map; that he searched north, east, south, and west of that stake for the monument described on the map, but found nothing; that he then went to the northeast corner and there found a Wasson stake, but not the monument described on the map, although he made diligent search for it in all directions; that he investigated the valley with reference to small hills from the San Pedro ranch down; that where the north center monument is the valley narrows considerably and that this hill is on the eastern edge of the hills on the west side of the river; that the whole country there is a limestone formation, and some 5 or 6 miles south the *mesa* or table-land runs out into the valley again and forms two or three small hills there; that the word "hill" in the original is "*loma*," and all these are "*lomas*," and that the word "hill" does not exactly translate "*loma*;" that there are similar hills south of the line along the San Pedro River; that the center or initial point is described as being a small hill in the valley, and that there is no such hill anywhere in the valley between the table-lands on both sides; that he did not go to the Bachata *cañon;* did not examine the San Pedro grant at all; that the Huachuca Mountains

lie west of the river, are probably 20 or 25 miles long, run a little north or west from where the boundary line crosses them, and at the west end are probably 10 or 15 miles wide; that the Mule Mountains are on the opposite side of the river and do not cross the boundary line, starting some 3 or 4 miles from it, the foothills *running down to the line*; that the east end of the Huachuca Mountains cross the line, the line running over a spur of the mountain; that that range does not have the same general tendency as the river, up and down, but run from the river, diverge toward the west from south to north; that the river runs a little west of north; that the mountains diverge more than the river does, from their southern end toward the west; that he located the north center monument from the Wasson and Roskruge maps, and had no other means of locating it; that he could not find the initial point described in the *expediente*, although he made special search for it; that he could not take any of the subpoints and work back from one to the other and locate the initial point; that if the 400 cords were run out from the north center monument they would not reach what is laid down on the Roskruge map as the north line of the San Pedro grant by at least 10 miles; that if the 4 leagues were run out from the north line of the San Pedro grant as laid down on this map they would not reach the north center monument, and that he could not take the *expediente* and go and locate the initial point and survey this grant. (R., 63–67.)

On cross-examination, Mr. Flipper testified that he

was accompanied in his investigation of this grant by Mr. Burnett and Mr. Haviland, and also by Mr. Herrick and another man; that the monument described by him as the United States boundary monument had "W. H. E., U. S." on the north side and the initials of the Mexican commissioner on the south side; that there are two such monuments, the south one being on the east side and the north one on the west side of the river, both built by the boundary commissions; that he did not go on the grant to survey it, but to find and identify the monuments if possible. (R., 67–76.)

On redirect examination, witness testified that in his travels over the country investigating land claims in Arizona he had never seen a monument built of stones and mortar by Mexican officials, and such monuments as he had seen are modern.

On recross-examination he testified that his reason for believing the monuments to be modern rests on the appearance of the stones in the monument. When a stone lies on the ground the upper side acquires a color different from that of the underside, and when such stones are removed and placed in a monument the fact that they had recently been placed there is apparent from the color of that side that had laid next to the ground, and that by "modern" he means ten or fifteen years, and certainly not prior to 1853. (R., 76.)

Max Marks was recalled for the purpose of identifying the photograph of the initial monument of the San Pedro grant (R., 77), as also was Douglass Snyder (R., 78–79).

GEORGE J. ROSKRUGE was recalled on behalf of the plaintiff to further identify the photograph of what he designates as the initial monument of the San Pedro grant, and says there were no cuttings or markings on any of the stones of that monument. The remainder of his testimony is with reference to the location of the mountains and Major Emory's survey of the international boundary line and the controversy between him and the Mexican commissioner resulting in the change of the monument, which the United States contends accounts for the second monument, which Roskruge and his confrères located as the north center monument of the San Pedro grant. (R., 79–84.)

THOMAS A. BORTON testified, on behalf of the plaintiff, that he resides at Tucson and has lived there since 1872; was employed in the surveyor-general's office in the years 1881 and 1882, and again in 1887. While so employed he was instructed to make the measurements in Cochise County for the boundary line. Witness had occasion to measure the distances between what is known as the town or location of Hereford, on the San Pedro River, and the boundary line, in January, 1887. The measurement was made by an odometer, and the distance between these two points was something over 7 miles by the road.

On cross-examination he states that he went there to locate the initial point of the San Pedro private land claim, BUT HE COULD NOT AND DID NOT LOCATE IT WITHIN THE UNITED STATES, and he had no authority to cross the line.

On redirect examination, he states, in answer to a question why he did not locate it, that he had a copy of the *expediente* there with him, but owing to the indefiniteness of the description of the calls of the grant it was impossible for him to locate the initial point where the claimants asserted it was in their petition for the preliminary survey and in the map filed by them showing the initial point; and it became necessary for the surveyor-general to send the witness to make an investigation to ascertain where the initial point was, and from this data he was unable to locate it. On recross-examination he states he was unable to locate it within the United States. (R., 84–85.)

Counsel for plaintiff then offered the documentary evidence as shown in the record.

Upon the testimony thus presented the Court of Private Land Claims on the 30th day of March, 1894, gave judgment in favor of the United States, holding that plaintiff's petition was invalid, rejected the claim, and dismissed the petition on the ground that the officers purporting to have made the grant were not authorized so to do, they being State officers and the title to said land being at said time vested in the National Government. The opinion of Mr. Justice Fuller rejecting the claim appears at record page 187.

An appeal was sued out by the plaintiff on August 22, 1894, and came on for hearing before this court on March 16, 1898, and was decided on May 31, 1898 (*Camou* v. *United States*, 171 U. S., 277). By that decision it was held by this court that the title papers

presented were made by a competent authority, and were therefore valid, and that the grant was entitled to confirmation to the amount of land paid for. The holding of the court was as follows:

> As for the reasons heretofore mentioned we are of opinion that a valid grant was made in this case, we think this arbitrary declaration by a temporary dictator was not potent to destroy the title. The decree of the Court of Private Land Claims must therefore be reversed. As shown by the statement of facts the survey of the land claimed in the petition is in excess of the 4 *sitios* granted and paid for. While the excess is not so great as in many cases, yet we think the ruling laid down in *Ely's Administrator* v. *United States ante*, 220, should control, and that this Government discharges its full duty under the treaty when it recognizes the land as valid to the amount paid for.

Turning to the Ely case, just referred to, it will be found that the court remanded said case with instructions as follows:

> In view of these considerations we are of opinion that this grant should be sustained to the amount of $1\frac{3}{4}$ *sitios*, and the judgment of the Court of Private Land Claims is reversed and the case remanded to that tribunal, with instructions to examine and decide whether there be sufficient facts to enable it to determine the true boundaries of the $1\frac{3}{4}$ *sitios*.

Applying the decision in the Ely case, as just set forth, to this case, it follows that the same was remanded

by this court for the purpose of "examining and deciding whether there be sufficient facts to enable the court below to determine the true boundaries of the 4 *sitios* granted." The mandate of this court was presented to the Court of Private Land Claims on January 31, 1899, whereupon the court admitted testimony presented by the claimant for the purpose of establishing the location of said 4 *sitios* within the survey presented by them on the original hearing. This testimony was, in brief, as below indicated.

There was presented a certified copy of the field notes and plat of a survey of this grant made by Solon M. Allis, under the direction of the surveyor-general of Arizona. (R., pp. 204–228–234.) This survey contained exactly 4 *sitios*, tied on the north to the limy hill claimed by plaintiffs as their north boundary, and continuing thence southward along the course of the river, with the uniform width of 1 league and of the length of 4 leagues, thus making the quantity of the 4 *sitios* mentioned in the title papers. The survey thus made by Allis leaves between its south boundary and the north boundary of the San Pedro grant, as claimed by plaintiff and established by Roskruge, an interval of over 2 miles.

The plaintiff also presented, after proof of the death of witness (R., pp. 214–215), the testimony of Francisco S. Leon and Pascual Cruz (R., pp. 234–235), to the effect that the ranch of San Rafael del Valle had been held in possession of Don Rafael Elias in time past; that he had much stock thereon, and that it was abandoned on account of the Apache Indians before

the time of the war with the United States. These witnesses also testified that, in their opinion, it was impossible for said Elias, with safety to himself and stock, to have held possession of said ranch between the date when he was driven off of the same and the date at which the Indians were suppressed by the American troops.

GEORGE J. ROSKRUGE, the principal witness for the plaintiff on the original hearing, was reintroduced on this further hearing (R., 205) and testified, in substance, that the San Pedro River runs through this grant in a northerly direction, and that said grant is located between the Mule Mountains on the east and the Huachuca Mountains on the west. Witness further testified that he had made a search for the center monument of the grant for two or three days, pursuant to data furnished him from the surveyor-general's office, but that on a reexamination of the *expediente* he failed to find any monument called for therein as the center monument on the San Rafael del Valle grant. Witness testified that, having ascertained the position of the limy hill, called for as the boundary on the north, and the north boundary of the San Pedro ranch, called for on the south, it is possible for him to fix the center point of the grant, and he does fix such center point at the point C on his map (R., pp. 206–236). such point C being the middle point of a line running from the said limy hill, as located by Roskruge, to a point on the San Pedro River at its intersection with the north boundary of the San Pedro grant, *as located by Roskruge.*

Roskruge further testified that this center point thus arbitrarily fixed by him is on the left bank of the San Pedro River, probably 200 or 300 feet from it, and that if, in making a survey of the valley lands along the valley, he desired to take a center for that survey it would ordinarily be placed as he placed it, to wit, midway between the north center of the grant and the south center thereof, and near the river. Witness further testified that, in looking for the center of the grant originally, as disclosed by his testimony on the first hearing (when he stated repeatedly his inability to ascertain the center of the grant), he was looking for "little mountains," because the copy of the *expediente* furnished him said the survey was begun from a point fixed as a center "where there were some little mountains." Witness further testified (R., p. 207) that if this was not correct and the center monument was instead near some "hills," which were natural objects answering to that call to the west of the arbitrary center as now fixed by him, to wit, some rolling hills. Witness testified that the center, as now fixed by him, was 33,604.5 feet from the north boundary as located by him and the same distance from the south boundary. As the title papers make the distance from the center north and south 200 cords, or 27,590 feet, it will thus be seen that the measurement from Roskruge's arbitrary center north and south to the natural object named in the title papers is 6,014.5 feet, or over a mile in excess of such distance named in the title papers. The map embodying this arbitrary center thus fixed

by Mr. Roskruge was tendered in evidence (R., p. 236). Mr. Roskruge also identified an additional map embracing exactly 4 *sitios* of land carved out of the 20,034.62 acres contained in his original survey, by cutting off a triangle of 701.4 acres on the west and a triangle of 192.99 acres on the north, and a parallelogram, 1,779.45 acres, just south of this last-named triangle. It seemed to be the purpose of this testimony to suggest to the court a tract of land for confirmation containing the exact area named in the title papers, by deducting from the area within the natural objects the difference of 2,673.84 acres contained in these three bodies cut off from the south and north. No reason appears in Roskruge's testimony or otherwise why such a deduction might not as well be made from the east or west of the grant as from the north. Roskruge further testified that the little hills which he had mentioned as being in the neighborhood of his center point were west thereof a distance of probably 1,000 or 1,500 feet (R., p. 210). On a subsequent examination he corrected his testimony (R., pp. 237–239) by stating that these hills were probably 2,700 or 3,000 feet, or a little over half a mile from his arbitrary center. He also testified that these hills were what he would call *lomas*. It is to be noted (R., pp. 89–97), that the Spanish is "*cerritos*," and that the center is stated by said title papers to be at a place where there are some small hills (*cerritos*) (R., p. 97). It can hardly be contended that *lomas* over half a mile from a given point can be construed as answering a call for *cerritos* at such point.

The fact that there was nothing exceptional about the existence of *lomas* in the vicinity of this arbitrary center fixed by Roskruge, will be noted further on in his testimony, and indeed is also shown in the field notes of Solom M. Allis, above referred to (R., p. 232), where in describing the arbitrary center fixed by him, which is over a mile north of the Roskruge center, he mentions that the same is near some little hills. On cross-examination (R., p. 210) Roskruge shows that running 200 cords south from the north boundary fixed by him and 200 cords north from the south boundary fixed by him, there exists between the termini of such lines a *hiatus* of 12,208.10 feet, or about 2¼ miles. He also calls attention to the fact that the 4 sitios as laid out by him is less than 100 cords in width (R., p. 211), although the title paper states that it is to be that amount. In regard to his method of locating his center point he says:

> Q. Then you arrived at your center point by taking a point midway between your two extreme points—the north line of the San Pedro ranch and the little hills?
>
> A. Yes, sir; that is the way I arrived at the center point.
>
> Q. You did not first find a center point and then undertake to run your survey out 200 cordeles each way, north and south, so as to get to the end monuments?
>
> A. No, sir.
>
> Q. This survey was made upon the basis of the correctness of the end monuments, irrespective of the center?

A. Yes, sir.

Q. If the survey was alleged to have been made from the center point to these points, and they were arrived at by measurement, and you would do so, you would not arrive at either one of these objects, assuming that this center point is correct?

A. No, sir.

Q. To arrive at the center you assumed that the north center monument, the limy hill, and the south center, the north line of the San Pedro, were correct, and you then measured back, and established your center point from these two subordinate points?

A. Yes, sir.

Q. And if they did not bring you back, what is the conclusion necessary?

A. Why, they made a mistake in their measurement.

Q. Or they did not measure it at all?

A. Yes, sir; or they did not measure it all.

Q. If, in identifying the particular 4 sitios of land that were bought and sold and advertised upon measurements from a center initial point, you can not find that point upon the ground itself, but have to go to the subordinate points and retrace measurements from them, it would leave a space in this case of over 2 miles between the ends of those measurements from the subordinate points?

A. Yes, sir.

Witness further testified (R., p. 212) that he, in his examination of this valley, went as far south as the San Pedro ranch or custom-house, which is about 6 or 7

miles south of the international boundary line. He further stated that the valley is formed of *mesa* land on both sides and rolling hills in some places (R., p. 213). Witness further testified that the San Pedro ranch or custom-house was located on the right bank of the San Pedro River, and that in his examination he believes he had a copy of the *expediente* of the San Pedro case (R., p. 213), which said *expediente* is found in record (p. 130).

The hearing of the case was resumed by the court on May 9, 1899, at which time Mr. Roskruge was recalled and identified certain photographs (R., p. 236), and was reexamined in one or two points. Among other things, he testified that he went on the summit of one of the little hills near his arbitrary center point, such hills being about half a mile west from said center, and that the height of one of these hills was about 42 feet, and that he was able to distinguish such hill from the surrounding country and apparently from the mountains by the fact that the mountain is a natural object which he would have to come down from if he wanted to get off of it. Witness further stated (R., p. 238) that there were some small hills on the west and east sides of the valley, and up and down the valley, and that they are all along the valley from up near the north boundary to the south boundary (R., p. 239). The attention of the witness was called to the fact that while he claimed that his inability to find the center of the grant on his first examination was due to the fact that his *expediente* called for "mountains" at or near the

center; as a matter of fact, on his first examination in the court he was asked absolutely nothing about mountains (R., p. 41), but was asked about hills. Referring to said previous examination (R., p. 41), it will be noted that witness was asked the following questions:

> Q. Now, let us go over the *expediente*. It says, in the presence of the interested party the measurement was begun at a place *where there were several small hills* [not mountains].
>
> A. Yes, sir.
>
> Q. Did you find that point?
>
> A. *That is the point I told you I did not find.*
>
> Q. You did not?
>
> A. No, sir.
>
> Q. Then, "continuing a south course, there were measured and counted 200 *cords*, the line terminating at the line of the ranch of San Pedro." Did you find the ranch of San Pedro near that line?
>
> A. I found the ranch of San Pedro was down in Mexico.

This concluded the testimony of witness Roskruge, and it will be noted that the only result of his testimony as bearing upon the matter of the center point was that he established such center point not primarily, but by bisecting a line connecting his natural object on the north boundary with his natural object on the south boundary, and that there is absolutely nothing about this center point thus arbitrarily determined to show that it was the original center point, the attempt to corroborate such arbitrary determination by showing the location of small hills half a mile west of such center

point, when the title papers call for hills at such point, being rendered nugatory by abundant proof in the record just quoted to the effect that such small hills are to be found on both sides of the valley, and up and down the same, through the entire length of the grant from north to south. It is respectfully submitted that if the presence of the small hills half a mile west of the Roskruge center is to be taken as indicative that the center was located as fixed by him, the existence of such hills at other points along the valley, as abundantly established by the testimony, is equally indicative that the center was originally located at such points.

With the exception of the title papers in the San Juan de las Boquillas y Nogales grant, tendered by the claimant (R., p. 241), and the title papers in the San Ignacio del Babocomari grant, tendered by the Government (R., p. 241), no further testimony was presented in this case, and it is respectfully submitted by the Government upon the record thus fully outlined that there was nothing adduced by claimant to show where the specific 4 *sitios* sold to Rafael Elias by the Mexican Government on the 25th day of December, 1832, were located.

BRIEF AND ARGUMENT.

The contention of the Government in this case is that this grant of 4 *sitios* is a mere float, being 4 *sitios* or 17,360.76 acres within exterior boundaries containing at the very least 20,034.62 acres, and that there being absolutely no means afforded of identifying where, within these exterior boundaries, such 4 *sitios* were

located. This is a tract that had not been located at the date of the Gadsden treaty, and is thus a grant claim which is specifically denounced as not entitled to recognition by section 6 of that treaty, reading as follows:

> No grants of land within the territory ceded by the first article of this treaty, bearing date subsequent to the 25th day of September, when the minister and subscriber to this treaty on the part of the United States proposed to the Government of Mexico to terminate the question of boundaries, will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico. (10 Stats., 1031–1035.)

The question of law thus presented is equally applicable whether the tract of land sold be considered as a float within the area developed by the Roskruge survey, or as a float within the larger area which the Government contends was included within the original survey; but as the larger area serves to emphasize the lack of location which characterized this grant at the date of the treaty, a few reasons will be suggested bearing on the Government contention as to the extent of this original survey.

For the purpose of this case it may be assumed that the limy hill fixed by Roskruge as the north boundary of the survey executed by the Mexican Government is correct, and no attack was made by the Government on the trial of the case upon his side lines, the same being

within the measurement stated by the Mexican surveyor. The question of the extent, therefore, of the land within which the 4 *sitios* granted is located hinges on the location of the south call of the title papers, to wit, "the *limits of* the San Pedro ranch." (R., p. 97.) For the purpose of establishing such boundary claimants put in evidence the San Pedro title papers. (R., p. 154 et seq.) That document is exceedingly vague and indefinite, and its construction and the location of the land therein mentioned have been the subject of controversy not only before the Court of Private Land Claims but also the tribunals of Mexico, as will be fully noticed by the court in the hearing of the case of the *Reloj Cattle Company* v. *United States*, No. 204 on the docket of the present term, that being an appeal from a decree of rejection entered by the Court of Private Land Claims in a case praying for the confirmation of said San Pedro grant. An examination of the title papers, however, leads to the conclusion that the north call of that grant, and therefore the south boundary of the grant now under consideration, was the Bachata Cañada or gulch (R., p. 161), and a good deal of the testimony presented by the claimants in this case was for the purpose of establishing said cañada and a monument of stone thereon, and thus fixing the south boundary of the San Rafael del Valle grant. It is not believed by the Government that said Bachata Cañada is located as alleged by the plaintiff, or that the north boundary of the San Pedro grant is located at the point which plaintiff claims is the Bachata Cañada. The only witnesses produced

by claimants as to the location of this cañada were Roskruge (R., p. 33), Douglass Snyder (R., p. 54), and Max Marks (R., p. 56), none of whom pretended to know of their own knowledge or from reputation in the country where this cañada was, or that the name of the cañada which they adopted was the Cañada Bachata. The most that these persons testified to was that a couple of Mexicans living at Santa Cruz, Concepcion Elias and Antonio Gonzales, showed them this place ast he Bachata Cañada. Outside of what these two men told them the witnesses had absolutely no knowledge of such place or its name. It is shown by the record that both of these Mexicans were living at the date of the trial (R., p. 39), and neither were introduced as witnesses on behalf of claimant. It is not believed that it is sufficient evidence of the existence of natural objects to introduce witnesses otherwise entirely ignorant of the country to testify that two other persons, both of them alive and competent to testify, had told them that such place was known by the name alleged, whereas in this case, the question at issue was the location of this grant, claimant could not preclude cross-examination as to the existence of a natural object by failing to produce the witnesses having personal knowledge of such natural object, and presenting instead of the direct testimony of such witnesses a statement of third parties as to what these witnesses had told them. It is respectfully submitted by the Government, therefore, that all the testimony of claimant attempting to establish the location of the Cañada Bachata by hearsay

was irrelevant and incompetent and should be ignored by the court. As unreliable was the attempt of Roskruge to fix the location of this San Pedro grant by reference to the other natural objects named in the *expediente* of that grant. It will be noted that he proceeded on the assumption that that grant was laid off by the Mexican surveyor in 1831, from a center point, an error, it may be remarked, into which the claimant of that grant also fell, as will be fully discussed before the court in connection with the San Pedro gran case, No. 204, October term, 1900, above referred to. An illustration of Roskruge's error in this matter is shown at record page 35, where he says: "I went to a monument which I believed to be the center of the grant of San Pedro." An intelligent examination of the *expediente* of that grant (R., p. 60) will disclose absolutely the fact that said grant was not measured by lines running a given direction from a center point, but was run by exteriors, beginning at a point on the perimeter and running by four courses around the tract and returning to such initial point. Mr. Roskruge's assumption in laying off the San Pedro grant from a center, as testified to by him, proceeds on an erroneous basis, which vitiates his whole survey and undermines his theory as to the location of that grant. Further evidence of Mr. Roskruge's error in this location is afforded (R., p. 35) by his reference to "old ruins, which answered the description called for in the [San Pedro] *expediente* as going toward the northeast." It is sufficient to say

that there is no call in that *expediente* for ruins, and that so far from there being ruins mentioned in the grant, the place therein referred to (R., p. 160) is still existant, and is known as the ranch of San Pedro, and is some 8 or 10 miles south of the international boundary. (R., pp. 41–2.) Mr. Roskruge (R., p. 35) also testified: "I found a monument there, and it answered the description of little hills, and they were the only little hills I found in the whole valley that would answer the description. Then I ran over and found a stony hill which is called for in the San Pedro *expediente*. I am running out the San Pedro *expediente* from the center northeast. I then went to the Bachata Cañon, a point in the San Pedro." The inaccuracy of Mr. Roskruge's theory is further developed by this quotation when compared with the *expediente*, which contains no reference whatever in this course to little hills or to a stony hill. Likewise (R., p. 36) Mr. Roskruge seems to have hunted for a "brushy place" mentioned in the *expediente*, but he testifies that "as it was all brush there we could not find anything, but we were certain we were on the right track." Mr. Roskruge's confidence that he was on the right track, in spite of his inability to find plain landmarks named in the *expediente*, evidences a willingness to establish the San Pedro grant on most unsufficient data that is even more forcibly illustrated elsewhere in the record. In connection with this mention of the "brushy place" it may be proper to call attention to the fact that the *expediente* says nothing

whatever about a brushy place, but, on the contrary, refers to the *Mesa Chinosa*, this being a mesa covered with the particular kind of bush with a curly foliage.

Mr. Roskruge having, on the statement of two men, who were not produced at the trial, found the Bachata Cañada and a pile of stones thereon—"an ordinary pile of stones" (R., p. 48)—proceeds to run west from this pile of stones, which he so confidently constitutes the north limit of the San Pedro ranch, for the purpose of encountering other monuments on that north boundary. It is significant that when he ran due west from said monument, to quote his own words (R., p. 38), he "went out and searched on the plain there, *but could not find a single thing.*" If he had, in fact, correctly identified the north boundary of the San Pedro ranch, it is very strange that he was unable to find, on pursuing that boundary westward, a single monument or the other call, either natural or artificial, on the same. A further inaccuracy of his theory is demonstrated (R., 44) when he testifies that the only little hills that he could find "were the ones that were called for in the San Pedro grant, the second course from the ford." The *expediente* contains no such call.

The testimony for claimant therefore affording no reliable basis for the location of the San Pedro grant, we next come to the testimony presented by the Government. From this it will be noted (R., p. 52) that Mr. Bonillas, a witness presented on behalf of claimant, retraced the San Pedro grant based upon a survey made thereof, and which retracement he testified to be correct, and as the result of his work on that survey

he testified (R., p. 52) that the grant as located by the former survey and relocated by him is entirely within the Republic of Mexico. The map showing Mr. Bonillas's resurvey is found at page 246 of the record. Mr. Bonillas also testified, in response to a question as to the initial center monument of the San Pedro grant, that "there is not supposed to be any monument there at all." This corroborates fully the Government's contention that this was a grant originally surveyed by exterior lines, and at the same time demonstrates the fallacy of Mr. Roskruge's survey, which is based upon the theory of a center point. The manner in which this San Pedro grant was originally surveyed is not more fully discussed here for the reason that it will constitute the subject-matter of discussion in the San Pedro case, No. 204, which, it is anticipated, will be under advisement by the court along with the present case.

Another witness for the Government on this subject, although presented on behalf of claimant, was Mr. Thomas A. Borton, who testified (R., p. 35) that he went down to locate the initial point of the San Pedro private land claim under instructions from the surveyor-general of Arizona, and could not locate it within the United States, it being within the Republic of Mexico.

In the transcript of the record in the San Pedro case, No. 204, page 178, is found the testimony of Angel Elias, which it is stipulated (same record, p. 179) should be used as testimony in the case now at bar. Said testimony was omitted from the present transcript by mistake, but as it is before the court in the record just

mentioned, along with said stipulation, it seems proper to call the court's attention to a portion thereof. In that record Elias was asked as to the ranch Palominos, and he testified that it was in Arizona, near the boundary line. He was apparently unable to state its exact distance from the boundary, but that is supplied in the present record by the testimony of Mr. Roskruge (R., p. 213) to the effect that Palominos was a mile or a mile and a half north of the international boundary line. Recurring to the testimony of Elias (San Pedro record, p. 193) it will be noted that Elias testified that what is called the San Rafael del Valle grant extends from Palominos on the south to Charleston on the north, and that he knew it was Palominos, but "they call it San Rafael del Valle," and he supposed it was the same place. This witness further testified that he had always understood, since his first acquaintance of this place, in 1850, that what is now San Rafael del Valle was the same as Palominos. Thus Elias's testimony fixes the south boundary of the San Rafael del Valle within a mile or a mile and a half of the international boundary line, and thus 10 miles or more south of the south boundary as fixed by Roskruge.

The effect of all this testimony is to show that the original survey of the San Rafael del Valle grant extended north and south 20 miles or more, from the limy hill on the north practically to what is now the international boundary line on the south, and that under the guise of locating a tract of land 4 leagues, or about 10 miles, in length, the original surveyor,

either because of incompetency or because, as Roskruge admits (R., p. 212), he may not have made any survey at all, delineated for this grant a tract of land upward of 20 miles in length.

The question now submitted to the court, therefore, is where within a tract of land 20 miles in length a tract 10 miles in length shall be placed. This is upon the Government's theory as to where the north boundary of the San Pedro grant was located; but acceding, for the sake of argument, to claimant's theory as to the location of that boundary, the problem is hardly less serious, for we then have presented a tract 10 miles in length to be located within a tract 12 miles in length.

It may be readily conceded that an arbitrary location might be made by this court, as was done by the court below, giving the claimant 4 square leagues of land included within the outboundaries; but it is not believed that this court will, in the desire to give parties a quantity of land equal to what their predecessors in title purchased from the Mexican Government, overlook the plain limitation imposed upon the Court of Private Land Claims in passing upon this character of title. This involves a brief consideration of what that limitation is. The wording of such limitation has been already set forth in quoting above the sixth article of the Gadsden treaty, to the effect that grants not duly located at the date of the treaty are debarred from recognition at the hands of the United States. It is to be noted that said limitation in the treaty applies not to invalid but to valid claims—claims which would but

for this provision be entitled to recognition. There must have been some purpose in ingrafting this provision upon the Gadsden treaty. The United States had but five years previously, in dealing with the Mexican Government, concluded a treaty by which a vast area of land was transferred from Mexican to American sovereignty. The Gadsden treaty adopted most of the provisions of the treaty of Guadalupe Hidalgo by reference, but in dealing with the matter of grants an addition was made to the former treaty, as above set forth. What was the purpose of that addition?

There was no requirement in the treaty of Guadalupe Hidalgo that the lands granted should be located prior to the treaty, the result of which was that large masses of land, particularly in California, were reserved from settlement and sale by reason of being within the exterior boundaries of some Spanish or Mexican land grant, and to guard against the repetition of such litigations this provision was inserted in the treaty of 1853. A comparison of the provisions of the two treaties will clearly show this distinctive difference. It is a universal rule of construction of all contracts and agreements, of particular force when construing the solemn acts of two sovereign nations, that every sentence, every phrase, and every word contained in the instrument shall be given some meaning, if possible. Particularly is this the case where two instruments of smaller character have been made between the two parties, one of which differs from the other. In such case courts must conclusively presume that for some good reason such a difference was made, and must give force and effect to

the difference, if possible. In this case the only difference between the two treaties is the word "located," and in compliance with the well-settled rules of construction it is the duty of this court to give that word some meaning. Now, what can it mean, unless it applies to a grant like this? It can not apply to a general float—that is to say, to a grant of indefinite quantity, or grants with the right to locate anywhere—for such grants have been universally held to be void by this court without any such words in the treaty; and there is no class of grants to which this word can apply except to that most common class of grants of specified quantity of land within exterior boundaries containing a larger quantity. If, then, as has already been said, this be a grant of 4 *sitios* of land to be located within exterior boundaries containing several thousand acres in excess of that quantity, or if it be a grant fixed by the title papers as 10 miles in length to be located within a tract over 12 miles in length, and the same was by the terms of the treaty to be located before it could be recognized by this Government, and if, in fact, it had not been located prior to 1853, these facts make it unlawful for the Court of Private Land Claims to confirm this grant, and this court is no less bound by the provision creating the court from which this appeal is taken.

The first of these land cases from Arizona to come before this court for consideration on the question of quantity was one which appears under the name of *Cameron* v. *United States* (148 U. S., 301), and which appears on appeal in another proceeding as Nos. 351 and

379 on the dockets of the present term. In that case the facts were and are that the land granted amounted to 4 sitios, the precise quantity involved in this case, but the natural objects set out as the limits of the grant contained many thousand acres in excess of said quantity, and the contention was that the claimants of that tract had claim or color of title to said natural objects. This court, in deciding the case in 1892, left to the Court of Private Land Claims, which had just been created by Congress, the question of the true extent of that grant under the title papers, and the appeal involving that grant and on the docket of the present term as *ibid.*, is taken by claimants from the decision of the Court of Private Land Claims, limiting the confirmation to 4 sitios. This court, however, in passing upon the title paper there involved, says:

> While a grant of 4 leagues in the place called San Rafael de la Zanja standing alone would appear to have been a grant of a certain quantity of land, when it appears by the same instrument that the limits of the grant were to be designated by landmarks of stone and mortar, that such designation was actually made, and that juridical possession of the land was delivered in pursuance thereof, it is at least open to doubt whether it does not fall within the class of concessions by specific boundaries as these grants are distinguished in *United States* v. *McLaughlin* (127 U. S., 428). *Under the view taken by the court below* that the grant was only 4 square leagues of land it was evidently a mere float and defendant would have no color of title to any

specific land until the same was designated, and would have no authority to monument and fence on any part of the tract.

As the court below and as this court on the former appeal limited the grant now under consideration to 4 sitios, and as the monuments inclose several thousand acres more than 4 sitios, this case is brought precisely within the rule announced by this court in the Cameron case, and just quoted, to wit, that this grant is a mere float and is precisely of the character of grant disclosed in the *McLaughlin case* (127 U. S., 428), and in the *Freemont case* (17 How., 542). The nature of a float is further discussed in the cases cited and in *Cameron* v. *United States* (148 U. S., 309); also in *United States* v. *Armijo* (5 Wall., 445), *Miller* v. *Dale* (92 U. S., 473), *Carpentier* v. *Montgomery* (13 Wall., 480), *Hornsby* v. *United States* (10 Wall., 232), *Snyder* v. *Sickles* (98 U. S., 203).

In the McLaughlin and Freemont cases, especially, the character of title here asserted is discussed, and in these and the other cases above referred to is pointed out the fact that a Mexican grant of quantity located within exterior boundaries containing a greater quantity does not until located take precedence over a grant made subsequently within the same outboundaries but located first.

The identity of the character of title here asserted with those known in California cases in which this court held, as above set forth, that a grant under the conditions developed by this record was a float, is made quite

evident by the more recent case of *Ainsa* v. *United States* (161 U. S., 208), involving the Nogales grant. That case is most instructive as showing the attitude of the Mexican Government toward the form of title here asserted, and it plainly indicates, as does the San Pedro case (*Reloj Cattle Company* v. *United States*, No. 204, this term); the Agua Prieta case (*Elg's administrator* v. *United States*, No. 250, this term), and the San Rafael de la Zanja case (*Christie* v. *United States*, No. 379, this term), that the owners of said grant have no right of any character in the tract of land surveyed to them beyond the exact quantity, and that as to such quantity the Government reserved the right to locate the same within the exterior boundaries, granting the surplus, when ascertained, on application of any party, to such applicant. Thus in the Nogales case (*Ainsa* v. *United States*, 161 U. S., 208), the title papers were based upon a resurvey made in 1841 of a grant made ninety-nine years previous thereto, and by which proceeding the *cabida legal* was set aside to the descendants of the original grantee and the surplus within the outboundaries sold to the predecessors in title of Ainsa's intestate. This was exactly the condition of affairs in the case of the California floats, as developed by the cases above cited, except that in those cases the Government did not locate any grant by quantity, already made within a larger area, prior to making a second grant within the same area; whereas in the Arizona cases, situate in the then State of Sonora, such location was made prior and preparatory to the sale of the surplus or *demasias*

within such exterior boundaries. The system prevailing in Mexico is evidenced by the Sonora State law or decree No. 51, of May 12, 1835, section 2 of which is quoted in the *Ainsa case* (161 U. S., 226), and the whole of that law, which is brief, is at this point inserted, and is as follows:

Law 51, State of Sonora.

The constitutional congress of the State of Sonora decrees as follows:

ARTICLE 1. Those who have acquired property in lands of the State by lawful title are holders in good faith, even when they have lost that document, for they are entitled to revalidate it upon proof of the incident that may have occurred.

ART. 2. So also are those who, under the boundaries set out in their proceedings of survey, occupy any overplus of lands, to which they are always entitled even when the overplus is shown, without other obligation than to pay for the excess according to the quality of the land and at the price that governed when it was surveyed and appraised; and only in case the holder does not need the overplus, or when this latter is very expensive, in the opinion of the government, based on the report of the treasury, shall it be adjudicated to whoever denounces or applies for it, who shall also be responsible for the resurvey if no excess should be found. In lands measured by estimation, excess or deficiencies shall not be so considered when they do not exceed half a *sitio*.

ART. 3. The right of lawful possession is not

lost because the land is deserted or abandoned, provided it is caused by the hostilities or incursions of the enemy as long as they last.

ART. 4. They are likewise holders in good faith who have obtained land by legal tradition. Those are reported as such who have paid into the depositories of the public treasury the proper value thereof, and likewise all those who prove occupation in good faith, which must be respected even when the dominion of the possession is afterwards adjudicated to another person by disposition of the laws that govern in the matter.

ART. 5. In all the cases specified in the foregoing articles, and in others of like nature that occur, when occupation in good faith is shown, the holders have the right to dispose of their properties, or to be indemnified by new occupants of the land for the essential improvements they may have made thereon. This shall be done by just appraisement by good and impartial men and by a third in discord, appointed by the parties and bound by an oath before the local authorities, under which understanding the bidders for the land denounced by virtue of decree No. 10, of May 30, 1834, shall enter the bidding.

ART. 6. All who have arbitrarily occupied or occupy lands belonging to this State are reputed holders in bad faith, as are also those who, having allowed the various extensions of time given for legalizing their possessions to pass, have not paid their proper value into the treasury in time, and still continue to defraud the

State of its dues, with malicious and culpable dissimulation. Upon proof of such reprehensible conduct not only do the holders in bad faith become liable to lose the lands and improvements they have made, but they shall thereafter be liable, besides, to a rental of 5 per cent of the value of the land for each year of arbitrary occupation.

Therefore I order it printed, published, circulated, and duly complied with.

Arizpe, May 12, 1835.

IGNACIO DE BUSTAMANTE.

JOSÉ MARIA FELIX,
Chief Clerk.

It will be noted that by the provisions of that law an excess of less than half a *sitio* is ignored in considering *demasias*, where land is measured by estimation, so that owners of land so measured within outboundaries containing not more than a half *sitio* above the area paid for, were not required to have a new survey made, but were considered by virtue of their ownership of the area paid for, or *cabida legal;* also the owners of the surveyed area, or *cabida total.*

The position here insisted upon by the United States was clearly recognized by this court in the *Ainsa case* (161 U. S., 221), when, speaking through Chief Justice Fuller, it said:

> Grants previous to the cession, which have not been located, are by the terms of the latter treaty not to be respected or considered as obligatory, as a matter of right, whatever the United States might see fit to do as matter of

> grace, under particular circumstances. And grants which have not been located would seem manifestly to be grants of a specific quantity of land within exterior boundaries containing a larger quantity.

The holding of the court in that case appears in the second headnote as follows:

> The grant which the plaintiff in error claims was a grant of a specific quantity of land, to wit, 7½ sitios and 2 scant caballerios within exterior boundaries, and not a grant of the entire 18 leagues contained within those exterior boundaries; and as location was a prerequisite to any action by the Court of Private Land Claims, and as the grant had not been located at the date of the Gadsden treaty, it can not be confirmed.

Making a change in figures appropriate to the difference in records, the principle above quoted from the Nogales case is applicable to and conclusive of the present case. If the Nogales grant was denied recognition because it was 7 sitios floating within 18, no sound reason can be given why the present grant must not be denied recognition when it develops that it is 4 sitios floating within exterior boundaries containing about 3,000 acres in excess thereof, according to plaintiff's contention, and is 4 sitios floating within two or three times that number of sitios, according to the Government's contention. It is difficult to see, if the Nogales decision is to be adhered to, how this court can adjudge the San Rafael del Valle grant to have

been located when at the date of the treaty it was good for a strip of land 10 miles in length floating within a strip, according to the Government's contention, over 20 miles in length, and according to claimant's admission over 12 miles in length.

It is assumed, however, that it will be contended by claimant that the case of *Ely* v. *United States* (171 U. S., 220) overrules the Nogales case, or at least so limits it that it has not the effect just ascribed to it. This involves a brief consideration of the Ely case. In that case it will be noted that while this court holds that it would be unnecessarily limiting the powers of the Court of Private Land Claims to hold that it is powerless to act when a tract was granted within outboundaries, it was then passing upon a grant with a well-defined center point, and that even in remanding the case for further consideration it did so with directions to the court below to inquire, and if the court below found sufficient reasons for determining "*the true boundaries of the tract that was granted*," the court should sustain the grant to the amount of $1\frac{3}{4}$ sitios actually sold. This court did not remand that case with directions arbitrarily to fix the quantity in any portion of the tract inclosed within the outboundaries, but with directions to examine and decide whether there were sufficient facts to enable it to determine the "*true boundaries of the one and three-quarters sitios*." The direction, therefore, was not to ascertain the boundaries of the large tract, but to determine the *boundaries* of the smaller tract, the exact quantity sold. This court has never held that it

was within the power of the Court of Private Land Claims arbitrarily to locate the quantity sold anywhere it pleased within the outboundaries, but it held in Ely's case that the court must have some basis for such location, and such facts before it supporting that location, as will justify it in concluding that the land thus located was the specific tract originally sold. In deciding the Ely case Mr. Justice Brewer is careful to say that the court does not "anticipate all the questions that may arise," but in that opinion, speaking for the court, he does suggest two or three proper bases which may support a finding by the court of the location of the specific tract sold. Among these is the existence of a definite center point from which the measurements were originally made, and which by reducing proportionately the excessive measurements in each direction to correspond to the exact measurement stated in the *expediente*, will fix the precise tract, the sale of which was contemplated between the parties at the time the money was paid. This, it is to be observed, is not locating the tract, but declaring its location. It is not accomplishing now, fifty years after the treaty, a location of the grant, but is declaring what that location was at the date of the grant. It is not locating, but is simply declaratory of a location. It is thus strictly within the terms of the treaty, since it is not within the bar of that section of the treaty precluding a present location. Likewise, Mr. Justice Brewer suggests that the "location of the waterway or the configuration of the ground may be such as to enable a

court of equity to determine *exactly* what was intended to pass under the grant." It is entirely clear that by that suggestion this court did not intend to permit an arbitrary location at the present time, but that there must be something which will enable the court to tell "exactly what was intended to pass." If any 4 sitios within a greater area were necessary, why the word "exactly?" If the court is permitted now arbitrarily to locate any 4 sitios and declare that such 4 sitios are to belong to claimant by virtue of his title paper, why the words "intended to pass?" The whole theory, therefore, underlying the decision in the Ely case is a location made previous to the treaty and an ascertainment by the court, upon sufficient proof of that location. It is not believed that the Ely case, when construed with the Nogales case, can for a moment be considered as justifying the Court of Private Land Claims in making a location of a grant unless proceeding on sufficient proof that that location covers the specific sitios sold and paid for by the grantee and that such location is "exactly the true boundaries of what was intended to pass under the grant."

This brings us to the final proposition as to whether there is anything in the record to justify the location declared by the Court of Private Land Claims in this case; or, in other words, is there in the record anything to show that the 4 sitios described in its decree were the specific 4 sitios sold to Rafael Elias? The only data before the court was a north and south boundary distant over 12 miles apart. Between these

two points was to be located a tract of land 4 leagues, or about 10 miles, in length. There was no center point established, as has been fully pointed out above in discussing the testimony, so that the controlling feature of the Ely case is absent from this record. There is nothing in the configuration of the grant, as suggested in the Ely case, to show whether these 4 sitios were located at the north end or the south end of the tract, or in the center thereof. The water course affords no basis, as suggested in the Ely case, for the reason that it runs from the north boundary to the south boundary, as fixed by Roskruge, and 15 miles or more farther south, and thus beyond the south boundary contended for by the Government. Consequently, 4 sitios placed at any point between the north and south boundaries equally responds to the terms of the *expediente*. It is not believed that the claimant can point out a single reason why a location of this grant adjacent to the limy hill on the north, as, indeed, it was placed by Solon M. Allis (R., p. 234), would not as fully respond to the terms of the title papers as the location made by the court, or why 4 sitios established immediately adjoining the south boundary fixed by Roskruge would not correspond as fully to the terms of the *expediente* as the location made by the court; or why 4 sitios, beginning at any other point, between the north and south boundaries, would not as fully correspond to the *expediente* as the court's location. Confessedly, there is a difference of over 2 miles between the measurement from north to south stated in the *expediente*

and what is shown on the ground to be the distance between the north and south boundaries. An initial point might be placed at each one of the 10,560 feet in such 2 miles, and each one of such locations of the 4 sitios would as fully correspond with the *expediente* as does the court's location. It is not known upon what theory the court selected the middle point of the line adjoining the north and south boundaries as the proper initial point. Such a location may have been based upon the theory that the original surveyor of this grant, if it was surveyed, made exactly the same error in running north from his now unknown center point as he did in running south therefrom, which is an entirely arbitrary assumption; and if, as was often the case in these grants, no survey at all was made, but the description was framed by a surveyor miles away, at the capital of the State, upon a description of the country given him by the claimants, this location is even more arbitrary.

It is not believed that it was the intention of this court to indicate by the Ely case that a location could be made of the grant now, but that all the court below could do under the terms of the act of its establishment and the treaties, which it administers, is to declare, upon sufficient proof, what was such location.

It is respectfully submitted that in this case there was no such sufficient proof and that this case should be reversed with directions to enter a decree rejecting this grant for lack of location under the provisions of

section 6 of the Gadsden treaty, as interpreted in the case of *Ainsa* v. *United States*, above quoted.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

WILLIAM H. POPE,
Special Assistant to the Attorney-General.

○